A Study of Comparative Law and European Law

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Published in:
Towards a Legal Framework for a Diffusion Policy for Data held by the Public Sector

Publication date:
1995

Document Version
Publisher's PDF, also known as Version of record

A Study of Comparative Law and European Law[1]

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I - From Information Gathered by the Public Sector to its Commercialization : the Community Guidelines and the Publaw Research

By very nature of their regulatory mission, civil services systematically and regularly gather information. Such information, whether it concerns financial data, information about car license holders or property owners, is valuable, both for the general public and for private companies, particularly those who, whether they increase its value by further processing or not, subsequently commercialize it.

The value of such information derives from characteristics inherent to its having been gathered by a public authority. *A priori*, the information is complete (all citizens targeted by the legislation in question being required to provide it), reliable (sanctions are envisaged for anyone giving false information) and inexpensive (civil services function on a non-profit basis). Thus a civil service becomes, in the words of the French observatory for new technologies, a 'natural deposit of information'. [2]

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1 Introductory summary of the PUBLAW study undertaken by the following institutions :
- the 'Centre de Recherches Informatique et Droit' (Namur, Belgium) Y. POULLET
- the 'Gesellschaft für Mathematik und Datenverarbeitung' (Köln/Germany) H. BURKERT
- the 'Centre for Information Law' (London/UK) J. MICHAEL.

This summary includes, under point III, certain passages already presented by the authors at the extended meeting of the L.A.B. on March 14th 1992.

2 in Ph. GAUDRAT, 'Commercialisation des données publiques', Report for the Observatoire Juridique des Nouvelles Technologies de l'Information, Paris, La Documentation française, 1992.

This explains the willingness of certain administrative bodies and certain companies, to commercialize data held by the civil service. The Commission of the European Communities, wishing to promote a European information market, [3] encourages this commercialization of 'administrative' data. Recently, the Commission has published its *Guidelines for improving the synergy between the public and private sectors in the information market* [4]. The essential goals of these guidelines, which otherwise consist only of straightforward recommendations, are the following :

— information held by the public sector must be accessible, except such as involves public safety, State security or such information as touches upon private interests (individual liberties and trade secrets); [5]
— the information must be made available for a reasonable charge or free of charge; [6]
— the information must be easy to re-format and re-use; [7]
— finally, information held by the public sector must be accessible and must be distributed in keeping with the principles of fair trade. [8]

This is corroborated by the American model, which affirms the will to commercialize data held in the public sector and specifies the limited, yet fundamental role to be played by the State. [9]

The PUBLAW research program, commissioned by the Commission of the European Communities, was called upon to study the regulatory framework of commercialization. [10] The present publication deals with the results of that study. Its intention is to describe the legal regime of the various national situations relative to the commercialization of data held by the public sector, to attempt a comparative synthesis of those regimes and, finally, to define a common policy for the dissemination of 'public' information. [11]

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3 Since it has been shown that 90% of the current information distribution market in Europe is in the hands of American organizations, the developement of a genuinely European information services market is currently one of the Community's priorities (Decision of the Council of Ministers, 26 July, 1988, J.O., L 28, p. 88/524/EEC).

4 Published by the Commission, 1989, Official Community publication, ISBN 92.825.9238.3.

5 Cf. Recommendations n° 1, 3, 7. Note that Recommendation n° 1 even affirms an obligation for the administrative departments to provide reasons for a refusal to render data accessible.

6 The price must reflect the costs of preparation and transfer to the private sector, without necessarily taking into account the full cost of such gathering and treatment as takes place within the framework of the civil service's work' (Recommendation n° 4).

7 This notably involves the use of standards and norms in the setting-up of storage systems (cf. Recommendation n° 3).

8 Recommendations n° 1, 8, 9, 11, etc.

9 Cf. in particular Recommendation n° 8 which limits direct commercialization by the public sector to cases where :
- it is essential in order to satisfy a public interest that the private sector cannot answer to;
- it represents the extension of an existing public service;
- a neutral service, separate from the private sector, is required.

10 H.BURKERT, J. MICHAEL, Th. DAVIO, C. de TERWANGNE, Y. POULLET, 'Commercialization of data held by the public sector', PUBLAW Report, DG XIII/EEC, presented to the Legal Advisory Board and the SOAC, 21 February 1991.

11 The first PUBLAW project was followed by a second one under the direction of the Policy Studies Institute (London), the Gesellschaft für Mathematik und Datenverarbeitung MbH (Bonn) and the Centre de Recherches Informatique et Droit (Namur). This second project : 'An evaluation of the implementation of the Commission's Guidelines' aimed at examining in detail the policy of each country with regard to the Guidelines and evaluating the policy to be adopted by the Commission.

II - THE PUBLAW RESEARCH : FIVE THEMES

Analysing the legal framework of the public sector's diffusion of information draws upon different types of legislation. Before such a choice can be contested, we have, *a priori*, identified five types :

— laws relating to public access to civil service records are often presented as a framework favourable to the diffusion of information gathered by governments (A);
— government secrecy laws as well as laws of data protection may, *a priori*, be considered as a brake on such diffusion (B);
— finally, two areas of legislation are expected to profoundly influence both methods of distribution and the relationship between the principle public and private parties : these relate to the existence of copyright held in the name of the government and that of the private sector competitor (C).

Each of these subjects invites to do certain general considerations.

A. Persuasive Factors : Laws of Access to Government Records

A number of European countries, following the recommendation of the Council of Europe [12], have adopted legislation on access to public records inspired by the American model, the Freedom of Information Act. Reference may be made to the Austrian, Danish [13], Finnish, French [14], Dutch [15], Norwegian [16] and Swedish [17] national legislations. All these texts aim essentially at ensuring that every citizen can monitor and understand his government's actions. It is clear that the commercialization of government information, if not the primary object of such legislation, is indirectly encouraged thereby, except in the particular case of the French law.

The justification for the laws of access forming a basis for commercialization of government data runs as follows :

— the right of access itself is based on a human right : the right to

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12 Recommendation n° R (81) 19 of the committee of Ministers on access to documents held by government. Note that the European Community Council has recently adopted an access directive from the ministerial committee concerning access to environmental documents.

13 Lov 280 af 10 juni 1970 om offentlighed i forvaltningen, amended by the Lov 572 af 19 december 1985.

14 Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public, J.O. 18 juillet 1978, modifiée par la loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs, J.O. 12-13 juillet 1979.

15 Wet openbaarheid van bestuur van 9 november 1978, Stb, 1978, 581, revised by the Law of October 31 1991 containing dispositions relative to the public access to governmental information.

16 Lov 19 juni 1970 nr. 69 om offentlighed i forvaltningen.

17 Chapter 2 'Om allmänna handlingars offentlighed' of the Svensk författningssamling 1982 : 941.

information enshrined in article 10 of the European Convention on human rights. Such a basis forbids — and this is the fundamental principle of human rights — any inquiry as to finalities. Since its second monitoring report, and notwithstanding article 10 of their national law, the French commission (Commission d'accès aux documents administratifs) has been well able to recognize that the right of access exercised for a commercial purpose may avail itself of the law;
— the commercialization of civil service data merely expands the degree of dissemination of government information, which is in itself, the aim of the right of access;
— finally, to comprehend the drift of those who demand a separation of the rules of commercialization from those of right of access, their ultimate justification is surely the desire to escape from the principle of gratuity in that which pertains to right of access and to establish the possibility of a certain profitability in the exploitation of data by the public sector itself. However, if the laws of access, for obvious social reasons, oblige the provision of a means of on-site access to records, which is free of charge, such a mode of access by no means exhaustively satisfies the right of access.

In our opinion, the laws of access constitute a partial regulatory framework for the commercialization of civil service data, even if the communication of data in large quantities and an increase in its inherent value by the private sector oblige us to view the protection of privacy exception differently, even in the light of the laws of access themselves, and to study the competition questions between the public and the private sector, and the laws of copyright, in a new context.

B. Dissuasive Factors : the Official Secrets Act the Data Protection Legislation

a. The civil servant's obligation to secrecy (Official secrets act)

The official secrets act binds civil servants under many west-European legislations in the form of a legal obligation carrying the threat of penal sanctions or disciplinary action. Traditionally, it is considered as a necessary prerequisite to assuring that the citizen gives his government correct information. Thus the oath of statistical secrecy imposes an obligation to secrecy upon collecting officials with regard to any nominative information they gather. This obligation to secrecy is the corollary of the obligation to inform which bears upon the individual who submits to statistical enquiry.

One may therefore perceive without difficulty that the commercialization of information could prove detrimental to the upholding of administrative secrecy. Access and secrecy are, *a priori*, contradictory notions.

Laws of access to official documents represent a clear infraction of the secrecy principle, inasmuch as they are intended to render administrative transparency, which is conceived as a citizen's right. Of course, access laws do not permit everyone to monitor everyone, reserving for the sole individual concerned

the right of access to nominative data, yet they nonetheless constitute an inversion of the burden of proof. To evade the obligation to transparency, the civil service is called upon to prove that maintaining secrecy is not only necessary to the accomplishment of their legal mission, but is furthermore justified by the need to protect their citizen's interests. In this sense, a government department need have no scruples about refusing access to documents relating to criminal proceedings or in cases where such access would involve a breach of business ethics.

b. Protecting personal data

The counterbalance between laws of access and personal data protection laws is evident and of two kinds :

— access laws reinforce the right that, according to privacy laws, each individual has to be aware of, rectify and complete such nominative data as an administration holds on him personally;

— by contrast, inasmuch as they authorize a citizen, in the interests of transparency, to have access to nominative data relating to another, access laws enter into conflict with the requirements of privacy legislation.

In this respect, access laws establish a clear superiority to privacy legislation. Among nominative data, confidential data are considered non-communicable, while other nominative data are subjected to a particular examination. Block transmission of such data, especially for commercial purposes, transforms this examination and increases its necessity.

Establishing harmony between the imperatives of data protection legislation and the requirements of the legislation for administrative transparency in the public sector is really no easy thing [18]. It is not a question of prohibiting all marketing of nominative data held by the State, but of posing certain limits. Recommendation n° R (91) 10 on the communication to third parties of personal data held by public bodies [19], already sets the first limit :

'(...) personal data or personal data files may not be communicated to third parties for purposes incompatible with those for which the data were collected.'

If the laws of access legitimate *a priori* the placing of non-confidential nominative data at the disposal of third parties, this availability must be made subject to a case by case examination and kept in accordance with the principles of the data subject's having over the data concerned both right of access and right of refusal for legitimate reasons [20], both principles deriving from data protection legislation. In

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18 We would like to cite, incidently, the supple approach to the matter taken in Quebec, where both access and data protection are the objects of a single legislative instrument (Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels, L.R.Q., chap. 1.2.1.).

19 Recommendation of 9 september 1991 (cf. in particular annex 2.2. of this Recommendation).

20 Another limit can be adduced from recommendation n° R (85) 20 relative to direct

this sense, verifying the stated purposes of those who demand access to the data is in fact justified by the application of data protection law [21]. Anyone applying for access to a nominative data base, must justify the pertinence of his use of that data with regard to his stated and legitimate aims, as well as the absence of any higher interest of the data subject or subjects in protecting the information concerning them [22]. One can see that this subtle balancing of interests must take place case by case and satisfy not only the specific regulations applying to the information product in question, but also, and particularly, those regarding the category of the potential client for that product. For example, it can be considered that a list of the students registered in a university can be sold to suppliers of goods or services directly connected to education.

C. Factors Which Give Structure to the Diffusion of Public Sector Information : a Public Authority's Copyright and the Rules of Fair Trade

a. Public authority's copyright

Different factors can compete to give structure to the diffusion of information held by the public sector. By means of specific rulings, various legislations permit certain public sector information products to be exempt from or included in the protection of copyright laws. This becomes an important issue at the level of national data banks. Is the State, or its government, right to claim copyright on the data bank information it administrates ? Copyright could be considered as a means whereby the public sector retains control of the material it collects in pursuance of its function. This calls into question the very concept of public service and the principle of gratuity by which it would seem, *a priori,* to be bound.

The recent European Commission's proposal for a directive concerning the protection of computer data bases [23] contains certain rules which resolve this debate.

Although the draft directive upholds the principle of conceding the protection of copyright to data bases, it reaffirms the demands of that protection and reserves a lesser protection, based on the rules of unfair competition, for insufficiently original data bases. Fair trade demands that protection under copyright does not permit a producer in a dominant position, in this case the government, to abuse that position. Following the *Magill* ruling, the draft directive imposes a system of so-called obligatory licences. More recently, the 'voice telephony' Open

marketing, which accords the data subject the right to know the destination of the file, as well as the right to refuse to have his name in the communicated list (cf. as regards telephone directories and orange or pink lists).

21 Which, as we have observed, is not the case where non-nominative data are concerned (supra, n° 6 and particularly footnote (9)).

22 On this delicate issue of balancing interests, see Th. LEONARD, Y. POULLET, 'Les libertés comme fondement de la protection des données nominatives', in F. RIGAUX, 'La vie privée, une liberté parmi les autres ?', Travaux de la Faculté de droit de Namur, Bruxelles, Larcier, 1992, p. 242.

23 J.O.C.E., C/156, 23 June 1992, p. 9 ff.

Network Provision draft directive [24] goes even further with regard to a particular data base, the electronic directory, recalling in this respect the recent doctrine of 'essential facilities'.

These last remarks lead one naturally to examine the final theme, that of competition.

b. The rules of fair trade

Conceived by the Guidelines known as 'Synergy' as imposing a restriction on the public sector's commercialization of the data it has gathered, recent developments in America may lead to another conception of the role of public authority.

Indeed, circular n° A-130, which is at the basis of the restrictive European attitude, is currently undergoing revision.

The Paperwork Reduction Act of 1980 [25] had, among its objectives 'to minimize costs to the Federal government of collecting, maintaining, using, and disseminating information', and 'to maximize that usefulness of information collected by the Federal government'. This Act was amended in 1989 [26]. A new emphasis was put on public access and dissemination. Today, current suggested amendments include certain aspects on information dissemination.

Taking this American development into consideration justifies a more positive approach to public authority's actions in disseminating public information. The so-called 'Open Network Provision' model, developed for telecommunications, may serve this purpose.

As far as tariffs are concerned, the civil service's duty to communicate information to the public, and the tariffing of such a set-up are, for the most part, defined by the principle of gratuity. The only possible interpretation of this principle is that the civil service takes in charge all the costs necessary for the accomplishment of its mission. Certainly, the cost of a copy excepted, such would be the case if the public information service consisted of a simple right of view on site [27]. However, if this public service in some way increases the inherent value of its service either by assuring, for example, ease of access for everyone (through the setting up of a distribution centre, or the renting of lines, the creation of public terminals, etc.) or by improving the content or the presentation of the product in a way corresponding to the needs of the department concerned, then the principle of gratuity does not prevent the levying of a charge on this increased value to cover the civil service's increased costs. In any such hypothesis, the principle forbids the levying of charges for the collection or the elaboration of data when these operations are required

24 Proposal for a Council Directive on the application of open network provision (ONP) to voice telephony, COM (92) 247 final - SYN 437, 27 August 1992.

25 Public Law 96.511.

26 Public Law 99.591, Title VIII, Part. A.

27 It is such a reduced service which is considered by the majority of laws of access to administrative information; in this way, article 4 of the French law of 17 July 1978 envisages : 'access to administrative documents can be exercized by means of a) on site consultation, except where the preservation of the document renders either this or the copying thereof impossible; b) except in the event of reproduction risking damage to the document, by the making of a single copy at the expense of the applicant, at a price which may not exceed the real cost of the functional charges incurred by the carrying out of this requirement'.

within the framework of the department's internal needs. As far as telecommunications regulations are concerned, the method of approach prescribed is cost-based [28].

III - THE PUBLAW RESEARCH : FIVE AREAS

To illustrate the diversity of the various national approaches and the risks connected with the question of the commercialization of data held by the public sector, the study has identified five types of data index compiled by the public sector, whose contents are of indisputable interest to the commercial sector (credit institutes, mailing and market research companies, etc.). These are : statistical data bases (A), data bases relating to vehicle registration (B), commercial registers (C), files relating to credit risk (D) and, finally, population registers (E).

This publication cannot, unfortunately, enlarge upon those chapters of the report devoted to the analysis of the different national legislations with respect to each of these types of data bank. The reader will find instead a rapid synopsis of these chapters under the heading dealing with that particular data bank type. The text of these thematic reports will be sprinkled with specific considerations deemed particularly important with regard to such data banks, without necessarily judging that these require systematic comparison.

Some of the considerations covered below will enable the reader to appreciate at once both the diversity of the national legal frameworks in which each data bank is functioning, as well as the manifold kinds of friction which can arise between regulations referring to the different themes selected above, when these are applied to a specific type of data bank.

A. Statistical Information

a. Interest of the issue

Statistical data constitute a major source of commercial information due both to the quantity of the information on record and to the quality of the data available. The data pool is vast because it covers numerous fields over periods of many years; the quality is high due to the citizens legal obligation to reply accurately.

Such information is available in all the EC Member States.

b. The situation in the different states of the EEC

All the Community countries dispose of statistical institutes, either centralized or decentralized, which are responsible for the gathering of nominative information

28 Such a costing policy is recommended by the 4th Synergy Guideline : 'A price should be established which reflects the costs of preparing and passing it to the private sector, but which does not necessarily include the full cost of collecting and handling it in the course of routine administration

and the distribution of general information. Within the different countries, this data service is made available to the public either free of charge or at a modest price. Both organisation and exploitation of the data bases developed by these institutes are regulated by law in the majority of countries. To illustrate this, we cite the following legislations :

Belgium :	Law of 4 July 1962
Denmark :	Access to public administration Files act section 10, n° 6; Public registers Act, Section 13, subsection 6, and section 18
France :	Financial law of 27 April 1946; Decree n° 46-1432 of 14 June 1946; Law n° 51-711 of 7 June 1951; Decree n° 84-628 of 17 July 1984; article 34 of the law of 6 January 1978
Germany :	Bundesstatistikgesetz, 1987, I, 462ff
Greece :	Legislative Decree n° 3627/1956 on the organization of the national statistical service of Greece
Ireland :	Statistic Act 1926, modified in 1946
Italy :	Decreto Legislativo 6 settembre 1989, n° 322
Luxembourg :	Loi portant institution d'un service central de la statistique et des études économiques, 9 juillet 1982
Netherlands :	Law of 28 December 1936 relating to the rules on the perception of the economical statistics, Stb. 639 DD
Spain :	Law 12/1989 of 9 May 1989 on the public statistical function

Population censuses are taken by national statistical institutes but the nominative data collected and recorded are generally not available in that (nominative) form.

c. Analysis

The existence of personal or nominative data at the basis of the statistical action indirectly raises questions regarding the protection of privacy.

In principle, access is permitted to anonymous and general data in aggregate form. This is the case for data that have been 'anonymized'.

In Belgium, everyone has access to global and anonymous statistics. In Denmark, the access to basic statistical information registered in electronic data bases is prohibited. The right of access to final statistical information is submitted to general rules of access. In Germany, distinction is made between survey element (aggregated elements, statistical results) and auxiliary elements (which are personal elements, auxiliary elements of the survey and have to be erased as soon as they are no longer necessary for the survey). In Italy, communication of aggregated data in view of guaranteeing the anonymity is allowed. In the Netherlands there is no disclosure of personal date, the figures are always incorporated or aggregated. In Luxembourg there is no transfer of personal data.

Exceptions to this principle exist. Thus, it is possible to cede access to nominative, non-aggregate data, but only to persons bound by oath to secrecy. The oath hinders the diffusion of nominative data. In this case, access to nominative data is free of charge, which prevents any commercialization of the same. Similarly, access to basic data is authorized for the purpose of scientific research. Such access is generally free of charge if carried out within the bounds of the public

service mission of the statistical institute.

Making global data available to the public can result in the 'de-anonymization' of the data. Anonymous information can be rendered personal if it is either too specific, too attached to a particular social group or viewed in combination with other types of information.

Similarly, statistical data can be examined in relation to maps, telephone books or other more personal information. Here again, the issue of personal data protection is at risk.

The monopoly on information gathering enjoyed by civil services in no way limits the intervention of private sector parties once the data are to be commercialized. As regards commercialization by the Office of Statistics itself and the levying of charges on the same, we cite the following rulings :

In Belgium, the current commercialization practice of the *Institut National des Statistiques* (*I.N.S.*) is reduced to general information. The price of the diffusion is lower than the cost price because of the non-commercial function of *I.N.S.* In France, the commercialization of anonymous data is organized. The *Institut National des Statistiques et des Etudes Economiques* (*INSEE*) makes a distinction between the applicant's proper use purpose and a commercial purpose. The tariff system adopted by *INSEE* allows the expansion of the private sector. In the Netherlands, responses by phone or by letter are free as well as the statistical information available on *Viditel* (PTT data network on screen) and *Teletekst*; prices vary for information on floppy disks and tapes.

B. Car Registers

a. Relevance of the subject area

Car registers provide useful information resources for the car producing industry and the car distribution trade. Furthermore such information is of use for insurance companies both for the settlement of individual claims and for statistical observations.

b. Problem areas

The main problem concerning car registers is the question of how much personal information may be made accessible to the private sector and under which conditions. National solutions to that problem are quite different : strict limitations of the accessibility for third parties to personal information can be found in Denmark, Germany, Luxembourg, Portugal and Italy. Restrictions exist in France on the admitted recipients of the information. There are no restriction in Belgium.

As regards the Danish and German solutions : in Denmark, the basic rule on third party's access to personal information stored in data banks is that private individuals have no access to information on other individuals' private matters.

Two main exceptions to this rule are admitted : when the data subject has given his consent and when the private sector receiver can demonstrate a legally protected interest that clearly outweighs the grounds for maintaining secrecy. In Germany, the various traffic related registers form the Central Traffic Information System (*Zentrales Verkehrsinformationssystem - ZEVIS*). The act regulating this system lists the purpose of the register, the data collection, its contents and the purpose and specific legal norms according to which data may be communicated and files may be matched. The relevant sections of the act were specifically designed to serve as a special sector data protection regulation. Accessibility for the private sector is basically reduced to anonymized data — which the principles of data protection do not apply to — as long as there is no danger of re-identification. The discussion in Germany has consequently focused, as the successive annual reports of the Data Protection Commissioner show, on the question as to when sufficient anonymity is reached [29]. Data can also be obtained for scientific and research purposes, for the pursuit of legal claims. Furthermore information may be passed on to car insurance companies and to the automobile industry.

The French solution is based on the following reasoning :

> 'Considering that the two purposes of processing, [...], are on the one hand the observation of the registration of the number of vehicles on the road, and, on the other hand, the provision of statistical and personal information to the various administrative bodies in the framework of their competencies, as well as to the French producers and some importers in France; considering that the provision of information to these private users, provision which comes within the framework of the industrial and commercial activities of the automobile sector, answers to a general interest by securing the development of a key sector of the national economy, ...' [30].

This problem is particularly pertinent because, within the EC, car registers are amongst the already highly automatized public registers (mainly because of the need of the public sector to obtain information on the holders of cars without delay), and they are, by their medium, an attractive source of marketable information.

Another problem concerns competition law. In some instances car register information is provided by private organizations executing a public function, in other cases this function is left to a private company as a market activity. In the latter case problems with regard to competition law may occur when such a function is conceded exclusively to one particular company. Competition law problems, however, might also occur when the public sector restricts the availability of information from this register to national participants in the automobile market.

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29 Federal Data Protection Commissioner, 'Annual Report for 1987', 1988, 46; 'Annual Report for 1988', 1989, 38 and 47; 'Annual Report for 1989', 1990, 51.

30 Deliberation of the CNIL n° 83-35 of 7 June 1983 (J.O,. 25 November 1983) relative to the central car register.

c. Situation in the EC

In all Member States car registers are kept on a central national level (with, in some cases, additional registers kept locally). In some countries (Denmark, Germany, Luxembourg and Portugal), these registers are kept directly by the public administration [31]. In Italy [32], the public authority provides on-line access on the basis of a licence agreement for standardized fees. In France, information is made available through an association [33]. In Belgium, information is made accessible by private sector companies (direct marketing companies and car distributors companies) which charge market prices for their services [34].

Most countries have strict limitations on the accessibility of personal information for third parties. There are restrictions on possible recipients of information in France, limited to the national territory, French car producers and certain importers. There are no restrictions in Belgium.

d. Analysis and information market perspective

There seems to be a general consensus on the wish that statistical data resulting from these car registers be generally available. Following from a purpose analysis of the car registers, there also seems to be consent that in individual cases personal data may be communicated. So, communication is authorized to car producers in cases of emergency for call back actions, as well as to insurance companies for the settlement of insurance claims, and to individuals for the defence of their legal interests. Beyond these limits only France and Belgium allow wider access to personal data. Among those maintaining these restrictions, regulations vary as to the framework in which these rules apply (a general law, a sector specific law, licensing agreements based on a regulation). There is further divergence with regard to the strictness with which the regulations maintain purpose limitation. The main divergence from this pattern occurs in France and Belgium, because of a different understanding of purpose.

31 In Denmark : Central Register of Motor Vehicles and Register of Drivers Licences.
In Germany : the registers are regulated by the Strasssenverkehrsgesetz (StVG) (in the version of BGBI.1 1987, 486) and the Fahrzeugregisterverordnung.
In Portugal : Art. 53 Decreto-Lei 55/75 de 12 Fevereiro.

32 Decreto del Presidente della Republica 13 marzo 1986, n° 156.

33 Law n° 70-539 of June 24th, 1970 mentions the driver's file. Deliberation of the CNIL n° 83-35 of 7 June 1983 (J.O. 25 November 1983) relative to the central car register. Decree of 11 October 1983 (J.O. 25 November 1983) relative to the computerized national file of vehicles registered on the French territory.

34 Royal decree of 31 December 1953 (last modified on 31 December 1956 and on 2 March 1979); Royal decree of 11 January 1990 relating to the registration of motor vehicles. Currently furter changes are under way in Belgium which, however, had not yet been finalized at the time when this repport was finished.

C. Company Registers

a. Relevance of the subject area

Information from company registers is an attractive asset for private sector information providers. However, to a large extent, company register information is still in a format or organized in a way which makes it less suitable for further distribution and particularly for combining it with other products or services, like retrieval or analytical tools.

b. Problem areas

Access to company registers is covered by an EC-Directive. It is covered by similar regulations in (almost) all EC Member States. So, accessibility as such does not seem to constitute a problem. The basic problem is whether 'access' comprises a right to obtain the 'totality' (bulk access) of registered information in view of processing this information in a private sector data base. This is seen as being problematic because some countries do not provide central registers whereas a bulk access might lead to a centralization of company registers information. A danger may also occur with regard to data protection, when no technical or legal restrictions are provided concerning information retrieval by individual names.

c. Situation in the EC

In a number of countries (Belgium, Denmark, France) [35] there are centralized (on the national level) company registers. In countries such as Germany and Italy [36], some centralized information is available, although there is no central company

35 Belgium : Law of 30 May 1924; coordinated laws 1964.
Denmark : Danish Company Act (Act n°370) of 1973.
France : Decree of 9 August 1953; prescription of 27 December 1958; law of 24 July 1966 on commercial societies; decree 73-314 of 14 March 1973, creating a national identification system and a directory of the companies and of their settlements; law of 3 January 1978, extending to private societies the registering principle; decree 84-405 on the centers of company formalities; decree 84-406 of 30 May 1984 relative to the company register and to societies; law of 17 July 1984 modifying the prescription of 2 february 1945 relative to foreigners; decree of 24 September 1984 on the company register and societies; law of 21 December 1984 on the need of specific premises and the execution of the preliminary registration formalities; decree of 23 December 1984 modifying the decree of 30 May 1984; law 85-698 of 11 July 1985 organizing the registration in the company register of associations and of societies. Law 78-17 of 6 January 1978.

36 Germany : § 8 Handelsgesetzbuch-HGB -(Commercial Code) and § 125 Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit - FGG (Law on voluntary jurisdiction).
Italy : The Company Register is prescribed by Art. 2188 of the Codice Civile; Art. 99 Codice Civile; Art. 2135, 2195, 2202 Codice Civile; Art. 2200 Codice Civile; Art. 2201 Codice Civile; Art. 2188 Codice Civile; Art. 100 Codice civile in its modification by Art. 8 L. 12 aprile 1973, n°256 and Art. 101 Codice Civile/For which the regulations for the companies with limited liability - based on L 12 aprile 1973, n°256 are applicable (under the responsibility of the Chambers of Commerce); D.M. 23 aprile 1977, D.M. 18 giugno 1979.

register in the public sector.

In most countries, decentralized registers are to be found either in addition to the central — public — register, or in addition to the central — private — register, or only as decentralized public registers. Such registers exist in Belgium (in addition to the central — private — register), Germany (in addition to the central — private — register), Greece [37], Luxembourg [38], the Netherlands [39], Italy (in addition to the central — private — register) and Portugal [40].

The (central) register is commercialized by the public sector in France and Denmark. If one adds the chambers of commerce to the public sector, the Italian *CERVED* (private company created by the Italian Chambers of Commerce) may be regarded as a public sector commercialization. Private sector commercialization takes place in Belgium through the company *EURO-DB S.A.*

However, some access limitations exist in certain States. The Dutch registers may not be retrieved by individual persons' names. In Germany, a Court decision has rendered lawful the refusal to allow comprehensive copying form the register.

The German case is worth being described. A company had asked a court in charge with the management of the register to be allowed to create microfilms of all the registered material administrated by that court. The company had offered to bear all costs of this process as well as to provide its own personnel to carry out the copying under the supervision of and in co-ordination with the court administration. While other courts, as administrators of a company register, had allowed such actions, the court in question refused. It argued that this request was not covered by the term 'access', that therefore it was a matter of administrative discretion whether to allow such a procedure, that in exercising its discretion the court had to take into account the fact that the German law has established a system of decentralized registers (there are more than 400 registers in the old *L nder* of Germany) and that, in contributing to the creating of such a centralized register by the private sector, the court would affect the privacy interests of registered individuals, since nation-wide retrieval by name would then become possible. The Federal High Court affirmed that it was sharing the view defended by the first court according to which the term 'access' does not cover the request in question. The Court therefore refused also to refer the matter to the European Court of Justice, since the Directive quoted by the company to back its demand [41] also used the term 'access', thus the terminology was not to be interpreted but simply not applicable. The Court went on to state that the decision of the 'register court' was a matter of discretion and that it did not see, in the arguments of the refusing 'register court' to

37 Law n° 2190/1920/Law n° 3190/1955.

38 Loi portant création d'un registre de commerce et des sociétés, 26 avril 1987 (23 décembre 1909); Arrêté grand-ducal concernant l'exécution de la loi sur le registre de commerce et des sociétés, 12 octobre 1987 (23 décembre 1909).

39 The company registers are regulated by the law of 26 July 1918 (Stb 493), lastly modified in 28 June 1989.

40 Decreto-Lei 144/83, de 31 Março as modified by Decreto-Lei 42/89 de 3 Fevereiro; Decreto-Lei 403/86 de 3 Dezembro as modified by the Decreto-Lei 349/89 de 13 Outubro; Cf. eg. Decreto Lei 60/90 de 14 Fevereiro (Introduction to the changes foreseen for the Registo Predial — the register on immovable properties).

41 Directive EEC 68/151 of 9 March 1968.

refuse access, any misuse of this discretion [42].

d. Analysis and information market perspectives

In the context of the information market, the individual access is not of relevance. What is of interest is the possibility of obtaining the totality of the register, including regular updates and preferably in electronic format, and the possibility of combining this information with other information and/or analytical tools to retrieve additional information. As the restrictions in the Netherlands and the court decision in Germany already suggest, the main problem concerns the personal data which are contained in the company registers.

D. Credit Risks Information

a. Relevance of the subject area

Public sector information that may be used to determine credit-worthiness presents some of the most difficult data protection problems, and also some of the greatest opportunities for private sector use. At one extreme, a person's address (available in some countries by published electoral registers) can be used to grant or deny credit. At the other extreme, court records of bankruptcies or unpaid court judgements can be used to deny credit. Between both extremes such controversial practices take place as the use of third-party information (such as court judgments not paid by someone unrelated to the data subject but who was living at the same address in the past) to determine credit-worthiness.

b. Problem areas

Although it is possible to argue that the conflicting interests are that of the debtor (or potential debtor) who seeks to restrict the disclosure of information about himself, and that of the creditor who wishes the greatest disclosure of such information, it can also be argued that publicity of credit rating information is in the long-term in the debtor's interest to avoid even greater debts. If such information is to be made available to the private sector, it would seem to be a basic requirement of sound credit business as well as a data protection requirement to ensure that it is accurate, relevant, and up-to-date.

c. Situation in the EC

Public sector credit risk information can include any nominative information such as that contained in electoral or population registers. Credit rating methods can

42 BGH 12.7.1984, IVa ARZ(VZ) 9/88.

include 'red-lining' to determine credit on the basis of the area of a borrower's residence. The analysis we develop here will concentrate on public sector information that is in itself directly relevant to credit, such as registers of credit agreements or registers listing the judgements for unpaid debts.

In Belgium there are two credit registers : the Consumer Credit Risk Office and the Credit Risk Office. The Consumer Credit Risk Office contains information on credit contracts above 10,000 BEF for which at least three payments have been missed. The register thus contains only negative, or 'black' information. A proposal of revision introduced in May 1989 was aiming at requiring the registration of all credit contracts. In that way, the register would contain positive, or 'white' information. However, this proposal has not yet been adopted. Organisations providing credit must consult the register before entering into a credit agreement [43]. The information may only be communicated for the purposes of credit. Individuals have a right of access to entries concerning them and have a right of correction of the potential errors affecting these entries [44]. The Credit Risks Office has information on every credit transactions above 1,000,000 BEF. This information is 'purely internal to the banking system' and is not to be traded [45].

In Denmark, the main public sector source of credit risk information is the *Statstidende*, an official publication listing all court-ordered sales, enforced composition schemes, and issuance of bankruptcy notices. Credit reference companies may only report such information if it has been officially published in the *Statstidende* (although information on individual debtors may be reported with the debtor's consent or if legal proceedings have been started). Other public sector information relating to credit concerns mostly legal proceedings such as bankruptcy hearings. Although there is a general right of public access to judicial proceedings [46], the right to obtain copies of court judgements and other documents is limited to those who can show a legal interest in the case. It has been held that a journalist does not have such an interest in a bankruptcy case [47], but it has also been held that a journalist would have a sufficient interest to be entitled to obtain a copy of the judgement in a prosecution of a municipally-owned cleaning company for environmental violations [48]. In 1981 the Ministry of Justice informed all courts, including the bailiff's courts responsible for most debt collections, that no information was to be communicated to credit inquiry companies. This is in addition to a Circular of 1942 from the Ministry of Justice [49] prohibiting the release of information about bailiff's proceedings. Information about bankruptcy proceedings may only be disclosed to persons demonstrating a legal interest. Such interest is recognized, for example, to creditors or to parties contemplating entering into a contract with the debtor [50].

In France there is a public sector register of dishonoured cheques. In Germany, the courts keep a register of all defaulters. Entries may be deleted on the

43 Royal Decree of 15 April 1985, Article 7.
44 Articles 5, 6.
45 Royal Decree (n° 185) of 9 July 1935, Article 12(8)
46 Section 29 and 41, Retsplejeloven (Administration of Justice Act) n° 567 of 1 september 1986.
47 Ugeskrift for Retsvaesen, 1989, p. 914.
48 Ugeskrift for Retsvaesen, 1982, p. 1202.
49 Ministry of Justice Circular n° 102 of 7 April 1942.
50 Section 9(1), Konkursloven (Bankruptcy Act) n° 298 of 1977

debtor's request, after three years or after the payment of the debt [51]. This is duplicated in the private sector. Deletion is automatic after five years [52]. There is also a bankruptcy register which is available for public inspection, entries of which are deleted automatically after five years [53]. Copies of the register are available for professional bodies, such as Chambers of Commerce and the bar council, and for other trustworthy corporations, persons or enterprises, such as credit reference agencies and investigation bureaux. All receivers must agree to observe a three-year limit on entries [54]. The Federal Data Protection Commissioner has proposed that further disclosure should be limited to information about particular individuals. Recently, an on-line central register of defaulters has been established for a closed-user group. In Italy there is a register of insolvency. Although insolvency judgements are posted for public inspection, the insolvency register is only accessible to the data subject by the registered judgement, to public administrative bodies, and to private persons requiring a certificate based on the information contained in the register in the context of an application for an employment. There is also an electronic data base of protested bills (*SANP - Sistemo Archivo Nazionalae dei Protesti*). This data base is based on the Official Bulletins published by the Chambers of Commerce, and is updated every fortnight. In Luxembourg, judicial decisions are matters of public record, but bankruptcy decisions are 'registered in the company register'. In the Netherlands, a credit register is kept by the *Nederlandse Bank*. In Portugal, information on insolvency and bankruptcy is included in the Commercial Register, which is available for public inspection [55]. The *Registo Predial* (Real Property Register) includes information on credit extended to property owners on the security of real property, and is available for public inspection [56]. In Spain there is a Central Information Service of Credit Risks.

In the United Kingdom, the two major public sector sources of credit risk information are the Register of County Court Judgements and the Electoral Register. County Courts are the main civil courts used for the enforcement of financial obligations. When judgement is obtained by a creditor, that judgement is registered and remains on the register until payment has been made.

The rules on public access to the Register provide not only for public inspection and copying, but also for searches and reports for various classes. The Register of County Court Judgements Regulations 1985 [57] generally require that

> 'the Register (...) be open to public attendance for the purposes of obtaining copies of any information contained in an entry in the Register, upon request in writing and upon payment of such fee as may be payable (...)'.

51 Section 915(2) Zivilprozessordning (Civil Procedure Act)
52 AVSchReg. 1.8.1955 (BAnz. n° 156)
53 Section 107(2) Konkursordnung (KO)
54 Section 1 AVSchReg.
55 art. 9J and 73, Decreto-Lei 403/86 de 3 Dezembro, as modified by Decreto-Lei 349/89 de 13 Outubro
56 Art. 104 Decreto-Lei 60/90 de 14 Fevereiro
57 Statutory Instrument 1985 n° 1807, County Courts Act 1984, section 73(2).

A common type of information taken from the Register and used by credit reference agencies is information about unsatisfied judgements against someone living at a particular address. This information is then made available for use consisting in evaluating applications for credit by anyone living at the same address, regardless of whether there is any relationship between both persons or whether these persons have lived there at the same time. This is called 'third-party information'. This practice is now the subject of a dispute between the Data Protection Registrar and the Credit Industry Forum, which represents building societies, finance houses, and other consumer credit organisations. The Forum has promised that on and after the 31st of July 1991 they will not disclose to lenders the names of people who have previously or later occupied a borrower's address. But the Registrar is not satisfied by this promise and he has announced that he intends to issue prohibition notices under the Data Protection Act, aiming at forbidding the use of third-party information [58]. CCN Systems Ltd has appealed against the notices to the Data Protection Tribunal. The appeal was heard on 14 January 1991, but the decision has not been taken yet. The Electoral Register is held locally, and includes the name and address of all the persons qualified to vote (United Kingdom citizens, Commonwealth citizens, and citizens of Ireland). The register is updated annually. There is a legal obligation to provide copies on payment of a fee. The Data Protection Registrar has proposed that a record of those who purchase copies of the Electoral Register be kept and made available to the public. On the Registrar's advice, the legislation establishing the Community Charge prohibits the selling of local Community Charge Registers.

E. Population Registers

a. Relevance of the subject area

There are many different types of population registers in EC countries, ranging from basic registers of births, deaths, marriages, and divorces, to current population registers with the name and current address of everyone living in the country.

Population registers are the most complete source of name-linked information. As such, when they are available, those registers are extremely valuable for direct mail and credit reference industries of the private sector. This is particularly true for the current population registers. Anonymized registers, such as census results, are useful as statistical information.

b. Situation in the EC

The United Kingdom [59] has recently adopted a form of current population register : a register of persons over the age of eighteen, for purposes of the levying of a *per capita* local government tax. These registers are open to public inspection,

58 Independent, 17 August 1990, p. 15.
59 Community Charges Regulations 1989, Statutory Instruments, 1989, n° 438, Sections 10 et 11.

but providing a copy of the register is expressly forbidden.

'Population registers' cover several types of register. All EC countries require public registration of births, deaths, marriages, and divorces, but the disclosure of such information to the public varies considerably, even within countries. The most common practice seems to be that the data subject is entitled to receive a copy of the relevant certificate. A general inspection of the registers generally is sometimes possible, but few countries provide a right to obtain copies of entire registers or of substantial extracts from them.

Until recently, current population registers, listing at least the name and current address of everyone residing in the country, have been more a characteristic of civil law countries than of common law ones. These registers are generally not available for use by the private sector, and public access is limited to access by individuals to the entries concerning them exclusively. The United Kingdom has recently adopted an unusual attitude by passing from a system with no current population register (except in the limited sense of the electoral register and registration of aliens) to a universal current register for purposes of the Community Charge.

A national census is taken in all EC Member States, although such operation has been delayed and even abandoned in some countries (e.g. the Federal Republic of Germany and the Netherlands) because of public concern over privacy. Most certainly because of this concern too, EC countries, with few variations, allow the public disclosure of census information only in anonymized form.

Registers of electors are maintained in all EC countries, although law and practice vary considerably as far as their disclosure is concerned. The United Kingdom and Ireland are perhaps the most open, with statutory rights to receive copies of such registers on payment of a fee. Two purposes for such disclosure consist in preventing electoral fraud by providing for public scrutiny of those registered to vote in particular districts, and in providing candidates with lists of potential voters for canvassing. In Luxembourg, authorities administrating the electoral register distribute campaign material on behalf of candidates. Electoral registers are a basic source of information for credit reference companies in the United Kingdom and Ireland.

The Belgian National Register is comprehensive, including all citizens, resident aliens, and diplomats. Each entry includes : full name, date and place of birth (and death, if applicable), sex, nationality, address, civil status, and marital status. There is a separate Population Register of citizens and resident aliens. Access to the National Register is limited to public authorities and subject access.

The Electoral Register is maintained of all those eligible to vote.

In Denmark, municipal authorities maintain population registers for their own areas. The information in municipal population registers is collected in the Central Personal Register [60]. The *Registertilsyn* regulates the administration of all the public registers. The information contained in the Central Personal Register includes : name, date and place of birth, individual identification number, address, occupation, appointment of legal guardianship, marital status, National Lutheran Church membership, and emigration. An individual is entitled to a printout of the registered information concerning himself or herself [61]. Some of the information

60 Folkeregisterloven (Act on Population Registration), Act n° 508, 14 September 1978.
61 Section 13(2)(3)

may be disclosed to persons other than the subject of the entry, but only if the applicant for the information can identify the person about whom the information is sought. The applicant must know the name and identification number, or the name and date of birth, or the name and former address. After such identification the applicant my be provided with the name, occupation, address (if the person has not requested that it be withheld) and information about whether the person has been subjected to legal guardianship, has disappeared, or has emigrated [62]. The same information may be provided on a defined group of people, but the applicant must be able to provide identification numbers for all of them. The information may be used by a business company, but only in connection with a previously existing relationship between the data subject and the company requesting access, and other conditions may also be imposed [63]. Additional information on an identified individual (such as a protected address to a creditor) may be disclosed to those applicants demonstrating a legal interest in obtaining it [64]. Electoral registers in Denmark are held by municipal authorities under the Public Administration Act. The data subject has a right of access to the data concerning him, and the registers are open to general public inspection each year form 1 to 8 February. But requests for copies of electoral registers for political canvassing or commercial purposes are denied. The Ministry of the Interior has advised that such access should be restricted under Section 13(6) of the Public Administration Files Act in the interests of personal privacy.

In France, the two major population registers are the National Register of Physical persons (*R.N.I.P.P. - Repertoire national d'Identification des Personnes Physiques*) and the Electoral Register. The *RNIPP* is maintained by the Statistical and Economical Studies National Institute (*INSEE*) and contains information on every person born in France since 1881, identified by a 13 digit number. The Electoral Register is also maintained by *INSEE*, with local copies kept in every township. Entries include the full name, residence, and date and place of birth. At several times, the *Commission Nationale Informatique et Libert s* (*CNIL*) (supervisory authority of the data protection act) has given advice on the use of the Electoral Register , with the following results. Any elector is entitled to be supplied with a copy of the local electoral lists, but commercial use should not be made of it. Candidates and political parties are entitled to obtain the electoral lists, but these lists can only be used for mailing and fund-raising during electoral periods. Computerized processing of such lists must be notified to *CNIL*.

German population registers are held locally, subject to federal framework legislation and to more detailed *L nder* laws. Everyone must register within one week after moving into an area. Entries include the usual personal information and other matters such as university degree, passport information and electoral information. Restrictions on disclosure of such information may be included at the request of the data subject if the authority finds that there are justifiable reasons. A right of access and correction is acknowledge to the data subject. Third parties may request information on single identified individuals. Requests for information about groups of individuals must be justified, and the information disclosed may be limited. Information relating to persons qualified to vote is available to groups

62 Section 3(1)
63 Section 3(3)
64 Section 3(2)

participating in elections, for use in connection with the elections, during the six months preceding them.

In Ireland there is no general population register. The electoral register may be in street or alphabetical order, with a statutory preference for street order [65]. The register is open to public inspection in June of each year. On payment of the prescribed fee, applicants are entitled to receive copies of the register, or of as much of the register as relates to any registration unit. The Italian population register may be used for purposes of public administration, but this register is only available to the general public in anonymized form. Individuals are entitled to certificates of their entries. Copies of community electoral registers are available on request, with no restriction on commercial re-use of the supplied information. In Luxembourg, requests for information on identified individuals may be granted if there is a justifiable legal interest, but general requests are refused. There is a right to make copies of electoral registers, but the Data Protection Commission has ruled against providing copies of voters' lists to political parties because of the ease of constructing parallel private lists. Instead, the Commission has decided that political parties should submit information for mailing to voters to the local administration, which, for reimbursement, would post the information to voters.

In Portugal, the population register is maintained on the basis of identity card information. This population register is available to public authorities. Individual entries are available to the person concerned by the information of the entries and to the others who can demonstrate a legal interest.

In the United Kingdom, the national census is taken every ten years, but the information obtained is available only in anonymized statistical form. To counter-act this, the regulations were changed in 1990 so that, by section 4,

> 'where prior the 1st November in any year the registration officer has received from any person a notice in which that person requests that a specified number of copies of the register of electors which is required to be published no later than 15th February in the next following year be supplied to him, and undertakes to pay the fee (...). The registration officer shall (...) supply to that person the number of copies of the register requested' [66].

The Data Protection Registrar has proposed that a public register be kept of those who purchase copies of electoral registers.

c. Issues

Access to population registers (and their possible misuse by government) is at the very centre of traditional data protection concern. The law generally reflects this somewhat by limiting access to the information contained in those registers to data subjects or third parties with particular and legitimate interests, or by limiting the period or the purpose of the access, as France does in limiting access to electoral registers for political mailing and fund-raising during electoral periods.

65 First Schedule to the Electoral Act 1923.
66 Statutory Instrument 1990 n° 520.